Nor ak Nyawai & Ors (suing for and on behalf of themselves and all other occupiers, holders and claimants of native customary right land (NCR) at Sungai Sekabai, Sungai Tajem, Tatau, Bintulu, Sarawak) v Tatau Land Sdn Bhd & Ors

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HIGH COURT (BINTULU) — SUIT NO 21–02 OF 2011 (BTU)
JOHN KO WAI SENG JC
26 JULY 2012

C

Civil Procedure — Res judicata — Issue estoppel — Plaintiffs claimed native customary rights ('NCR') over land registered in name of provisional lease ('PL') holder — Whether default possession order and writ of possession obtained by PL holder against occupiers of disputed land barred plaintiffs from suing based on NCR issue — Whether issuance of PL not actionable wrong per se as it recognised pre-PL NCR claims during title survey — Whether time for purposes of limitation therefore did not run from issue of PL — Whether indefeasible title of PL holder subject to pre-PL NCR claims — Whether plaintiffs right to have filed writ action instead of judicial review

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The first defendant was the registered proprietor of a provisional lease ('PL') over a parcel of land known as Lot 16. The plaintiffs sued the first defendant, and the second and third defendants for granting title to Lot 16 to the first defendant, on the ground Lot 16 covered land over which the plaintiffs and the persons they represented had native customary rights ('NCR'). The plaintiffs sought, inter alia, for a declaration that the PL in so far as it infringed or impaired the plaintiffs' NCR was unlawful and null and void and that Lot 16 should be excised out of the land area covered by the PL. The plaintiffs also sought a declaration that they were not bound by a possession order ('the possession order') the first defendant had obtained from court ordering all persons in occupation of Lot 16 to surrender possession of same to the first defendant. To enforce the possession order the first defendant had obtained a writ of possession. The possession order had been obtained in default as the plaintiffs and other interested parties were not made parties to the application for the order. For the same reason that they were not parties, the plaintiffs failed in their appeal to the Court of Appeal against the possession order. Prior to the instant suit, the plaintiffs had sued another party ('the first suit') claiming NCR over the same lands that formed the subject-matter of the current suit. In the first suit the plaintiffs had set out in a map — which became the judgment map — the area over which they claimed NCR ('the original NCR land'). In the instant suit the plaintiffs annexed a similar map to their claim but the boundary of the land on which they claimed NCR had extended beyond the Original NCR Land to include almost the whole of Lot 16. In the Original NCR Land,

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Lot 16 was located outside the claimed NCR land boundary. The High Court in the first suit gave judgment for the plaintiffs but on appeal to the Court of Appeal, the defendants' appeal was allowed and the plaintiffs' cross-appeal was dismissed ('the Appeals'). In the instant suit the first defendant applied, inter alia, under O 14A of the Rules of the High Court 1980 for four issues of law to be determined to dispose of the case summarily. The issues were (i) whether by reason of the decision in the first suit and the Appeals and the possession order, the plaintiffs' action was res judicata and/or barred by issue estoppel (ii) whether the plaintiffs' claim and reliefs sought were time-barred by s 2 of the Public Authorities Protection Act 1948 ('PAPA') and/or Item 97 of the Schedule to the Limitation Ordinance and/or s 202 of the Land Code 1958 (iii) whether the plaintiffs' action was procedurally wrong for not having been filed by way of judicial review and (iv) whether the plaintiffs' claim was maintainable in view of the indefeasibility of title acquired by the first defendant. The plaintiffs had obtained an injunction to prevent the execution of the possession order and the writ of possession but the Court of Appeal set it aside on the ground res judicata and issue estoppel arising from the possession order and writ of possession precluded the grant of the injunction.

Held, striking out the action against the first defendant with costs:

(1) The plaintiff's action was res judicata and/or barred by issue estoppel as a result of the possession order and writ of possession. The court was bound not only by res judicata and issue estoppel but by stare decisis from the Court of Appeal's decision setting aside the injunction from adjudicating upon the plaintiffs' claim for their NCR in Lot 16 (see paras 54, 55 & 57).

(2) There was no question the plaintiffs' NCR claim could have been raised as a defence to resist the application for the possession order to make it become a triable issue if the plaintiffs had been heard. Though the possession order was acquired without the plaintiffs being heard it nonetheless remained binding and enforceable until set aside. As the instant suit was filed after the possession order was granted and the appeal against the order was dismissed by the Court of Appeal, res judicata and issue estoppel had set in (see para 51).

(3) The first suit and the appeals were only concerned with deciding whether the plaintiffs had established their NCR over 'the disputed area' which was within the original NCR Land. The status of the plaintiffs' claim over the original NCR Land less 'the disputed area' remained unadjudicated upon. Since the issues on the limits of and validity of the demarcation of the boundary of the original NCR Land was never adjudicated upon, res judicata based on the judgment map could not be used to bar another suit

to claim for the rest of the original NCR Land or as enlarged, after proper survey, to include a part of the first defendant's land (see paras 77, 82 & 83).

(4) The plaintiffs' claims were not time-barred under PAPA, the Limitation Ordinance or the Land Code. Limitation did not run from the date of the issuance of the PL since that was not an actionable wrong per se because a PL was a qualified title that recognised the plaintiffs' rights to claim NCR over Lot 16 during the title survey. Limitation would run at the latest from the date of issuance of the lease to Lot 16 (which had not happened) or from the date the second and third defendants were shown to have denied the NCR claims of the plaintiffs as pre-PL rights (see para 91).

(5) The plaintiffs could apply for or be entitled to the remedies, reliefs or orders prayed for in the statement of claim as against the first defendant's title because the PL was not of the same calibre as a lease. The PL was subject to pre–PL claims which included the plaintiffs' NCR claims. A PL holder therefore could not raise indefeasible rights through the PL as a defence against any valid pre-PL claim including NCR. The effect of the reservation for valid pre-PL claims on PL land by s 28(2) and (3) of the Land Code and the Special Condition (iii) effectively watered down the indefeasible right given by s 132(1) of the Land Code to the registered holder of a PL (see para 92).

(6) The plaintiffs' writ action was in order and maintainable because of the substantial issues of fact that arose from their NCR claims (see para 102).

[Bahasa Malaysia summary

Defendan pertama merupakan pemilik berdaftar pajakan sementara ('PS') ke atas satu petak tanah yang dikenali sebagai Lot 16. Plaintif-plaintif telah menyaman defendan pertama dan defendan kedua dan ketiga kerana memberikan hakmilik Lot 16 kepada defendan pertama, atas dasar bahawa Lot 16 tertakluk dalam tanah di mana plaintif-plaintif dan pihak yang diwakili oleh mereka mempunyai hak adat anak negeri ('HAAN'). Plaintif-plaintif menuntut, antara lain, untuk deklarasi bahawa PS yang mana telah mencanggah atau menjejas HAAN plaintif-plaintif adalah menyalahi undang-undang dan tidak sah dan terbatal dan bahawa Lot 16 seharusnya dieksais keluar daripada kawasan tanah yang dirangkumi oleh PS. Plaintif-plaintif juga memohon untuk deklarasi bahawa mereka tidak terikat oleh perintah milikan ('perintah milikan tersebut') yang telah diperoleh oleh defendan pertama daripada mahkamah yang mana memerintahkan kesemua yang menghuni Lot 16 untuk menyerahkan milikan yang sama kepada defendan pertama. Untuk menguatkuasakan perintah milikan defendan pertama telah memperolehi writ milikan. Perintah milikan telah diperoleh secara ingkar memandangkan plaintif-plaintif dan pihak-pihak terlibat yang

lain tidak dijadikan pihak-pihak kepada permohonan untuk perintah tersebut. Untuk alasan yang sama bahawa mereka bukanlah pihak-pihak, plaintif-plaintif telah gagal dalam rayuan mereka kepada Mahkamah Rayuan terhadap perintah milikan tersebut. Sebelum guaman ini, plaintif-plaintif telah menyaman pihak yang lain ('guaman pertama') menuntut HAAN ke atas tanah-tanah yang sama yang membentuk perkara subjek guaman ini. Dalam guaman pertama plaintif-plaintif telah membentangkan di dalam sebuah peta — yang mana menjadi peta penghakiman — kawasan di mana mereka menuntut HAAN ('tanah HAAN asal'). Dalam guaman ini plaintif-plaintif telah melampirkan peta yang serupa dengan tuntutan mereka tetapi kawasan tanah HAAN yang dituntut oleh mereka adalah melebihi tanah HAAN asal termasuk hampit kesemua Lot 16. Dalam tanah HAAN asal, Lot 16 terletak di luar kawasan tanah HAAN yang dituntut. Mahkamah Tinggi dalam guaman pertama telah memberi penghakiman bagi pihak plaintif tetapi dalam rayuan kepada Mahkamah Rayuan, rayuan defendan-defendan telah dibenarkan dan tuntutan balas plaintif-plaintif telah ditolak ('rayuan-rayuan tersebut'). Dalam guaman ini defendan pertama telah memohon, antara lain, di bawah A 14A Kaedah-Kaedah Mahkamah Tinggi 1980 untuk empat isu undang-undang untuk ditentukan untuk menyelesaikan kes itu secara ringkas. Isu-isu adalah (i) sama ada disebabkan keputusan guaman pertama dan rayuan-rayuan dan perintah milikan, tindakan plaintif-plaintif adalah res judicata dan/atau dihalang oleh isu estopel (ii) sama ada tuntuan plaintif-plaintif dan relief yang dipohon dihalang oleh had masa melalui s 2 Akta Perlindungan Pihak Berkuasa Awam 1948 ('APPBA') dan/atau Item 97 Jadual kepada Ordinan Had Masa dan/atau s 202 Kanun Tanah 1958 (iii) sama ada tindakan plaintif-plaintif adalah salah secara prosedur kerana tidak memfailkan melalui semakan kehakiman dan (iv) sama ada tuntutan plaintif-plaintif boleh diteruskan melihatkan kepada ketidakboleh disangkal hakmilik yang diperoleh oleh defendan pertama. Plaintif-plaintif telah memperoleh suatu injunksi untuk menghalang perlaksanaan perintah milikan dan writ milikan tetapi Mahkamah Rayuan telah mengetepikannya atas dasar res judicata dan isu estopel yang berbangkit daripada perintah milikan dan writ milikan menghalang pemberian injunksi tersebut.

Diputuskan, menolak tindakan defendan pertama dengan kos:

(1) Tindakan plaintif adalah res judicata dan/atau dihalang oleh isu estopel hasil daripada perintah milikan dan writ milikan. Mahkamah terikat bukan sahaja oleh res judicata dan isu estopel tetapi oleh *stare decisis* daripada keputusan Mahkamah Rayuan untuk mengetepikan injunksi daripada dikenakan terhadap tuntutan plaintif-plaintif untuk HAAN mereka dalam Lot 16 (lihat perenggan 54,55 & 57).

(2) Tiada persoalan langsung tuntutan HAAN plaintif-plaintif boleh dibangkitkan sebagai pembelaan untuk menidakkan permohonan perintah milikan untuk menjadikannya isu yang boleh dibicarakan

sekiranya plaintif-plaintif hendak didengar. Meskipun perintah milikan yang diperoleh tanpa plaintif-plaintif didengar walau bagaimanapun ia masih lagi mengikat dan berkuat kuasa sehingga ia diketepikan. Memandangkan guaman ini telah difailkan selepas perintah milikan telah diberikan dan rayuan terhadap perintah telah ditolak oleh Mahkamah Rayuan, res judicata dan isu estopel telah bermula (lihat perenggan 51).

(3) Guaman pertama dan rayuan-rayuan hanyalah berkaitan dengan memutuskan sama ada plaintif-plaintif telah berjaya membuktikan HAAN mereka terhadap kawasan yang dipertikaikan yang mana tertakluk dalam tanah HAAN asal. Status tuntuan plaintif-plaintif terhadap tanah HAAN asal tidak termasuk kawasan yang dipertikaikan masih lagi tidak dihakimi. Memandangkan isu-isu ke atas had-had dan keesahan pembatasan kawasan tanah HAAN asal masih belum dihakimi, res judicata berdasarkan peta penghakiman tidak boleh digunakan untuk menghalang lagi satu guaman untuk menuntut tanah HAAN asal yang selebihnya atau seperti yang diperbesarkan, selepas tinjauan yang wajar, untuk memasukkan sebahagian tanah defendan pertama (lihat perenggan 77, 82 & 83).

(4) Tuntutan plaintif-plaintif tidak dihalang oleh masa di bawah APPBA, Ordinan Had Masa atau Kanun Tanah. Had masa tidak bermula daro tarikh pengeluaran PS memandangkan ia bukanlah tindakan yang salah oleh kerana PS merupakan hakmilik sementara yang mana mengenalpasti hak plaintif-plaintif untuk menuntut HAAN terhadap Lot 16 semasa tinjauan hakmilik. Had masa akan berjalan paling lewat dari tarikh pajakan dikeluarkan kepada Lot 16 (yang mana tidak terjadi) atau dari tarikh yang menunjukkan defendan kedua dan ketiga telah menafikan tuntutan HAAN plaintif-plaintif sebagai hak-hak pra-PS (lihat perenggan 91).

(5) Plaintif-plaintif boleh memohon untuk atau berhak terhadap remedi-remedi, relief-relief atau perintah-perintah yang dipinta dalam penyataan tuntutan terhadap hakmilik defendan pertama oleh kerana PS bukanlah dalam kategori yang sama seperi pajakan. PS adalah tertakluk kepada tuntutan pra-PS yang mana termasuk tuntutan HAAN plaintif-plaintif. Pemegang PS oleh itu tidak boleh membangkitkan hak tak boleh sangkal melalui PS sebagai pembelaan terhadap mana-mana tuntutan pra-PS yang sah termasuklah HAAN. Efek penrizaban untuk tuntutan pra-PS yang sah terhadap tanah PS oleh s 28(2) dan (3) Kanun Tanah dan Syarat Khas (iii) telah dengan efektif mengalahkan hak tak boleh sangkal yang diberikan oleh s 132(1) Kanun Tanah untuk pemegang berdaftar PS (lihat perenggan 92).

(6) Tindakan writ plaintif-plaintif adalah teratur dan boleh diteruskan oleh kerana isu-isu fakta substansial telah timbul daripada tuntutan HAAN mereka (lihat perenggan 102).]

Notes

For cases on issue estoppel, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 6750—6769.

Cases referred to

Alias bin Ismail v Hairuddin bin Mohamad & Anor [1997] 3 MLJ 724; [1997] 4 CLJ 669, CA (refd)

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (refd)

Ballare Jabu & Ors v Merawa Sdn Bhd & Ors (Miri Suit No 22–21–2007) (unreported); [2008] MLJU 953, HC (refd)

Balare Jabu & Ors v Merewa Sdn Bhd & Ors [2011] 4 CLJ 751, CA (refd)

Baltim Timber Sdn Bhd v Director of Forests & Ors [1996] 4 MLJ 103, HC (refd)

Bato Bagi & Ors v Kerajaan Negeri Sarawak and another appeal [2011] 6 MLJ 297, FC (refd)

Bato Bagi & Ors v Government of the State of Sarawak [2011] 6 CLJ 387, CA (refd)

Derawan Sdn Bhd v The Superintendent, Lands and Surveys, Bintulu (and 2 other Land References) [2012] AMR 259, HC (refd)

Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2008] 2 MLJ 812; [2007] 6 CLJ 741, CA (refd)

In the matter of Lot 16 Block 3 Sangan Land District, Tatau Land Sdn Bhd v The persons in occupation of Lot 16 Block 3 Sangan Land District, Ulu Tatau, Bintulu Division, Sarawak (Originating Summons 24–70 of 1980) (unreported), HC (refd)

Jalang ak Paran & Anor v Government of The State of Sarawak & Anor [2011] 3 MLJ 13; [2011] 3 CLJ 469, CA (refd)

Jok Jau Evong & Ors v Marabong Lumber Sdn Bhd & Ors [1990] 3 MLJ 427; [1990] 2 CLJ (Rep) 169, HC (refd)

Low Yin Kow @ Loo Ah Bah v Tor Len Hua [2002] MLJU 358, HC (refd)

Matu Tugang v Shin Yang Forestry Sdn Bhd & 2 Ors (Bintulu High Court) Suit No 21-03-2009 (unreported), HC (refd)

Nikodemus Singai & Ors v Sibu Slipway Sdn Bhd & Ors [2010] 10 CLJ 383, HC (refd)

Nor Anak Nyawai & Ors v Borneo Pulp & Paper Sdn Bhd & Ors [2001] 6 MLJ 241, HC (refd)

O'Reilly v Mackman [1982] 3 All ER 1124, HL (refd)

Pacific Bank Bhd, The v Chan Peng Leong [1998] 2 MLJ 613; [1998] 2 CLJ 440, CA (refd)

Pembinaan KSY Sdn Bhd v Lian Seng Properties Sdn Bhd [1991] 1 MLJ 100; [1991] 1 CLJ (Rep) 343, SC (refd)

Petroleum Nasional Bhd v Kerajaan Negeri Terengganu [2004] 1 MLJ 8; [2003] 4 CLJ 337, CA (refd)
PP v Richard Kwan [1970] 2 MLJ 286, CA (refd)
Roy v Kensington and Chelsea and Westminster Family Practitioner Committee [1992] 1 All ER 705, HL (refd)
SR Katherine Lim KH v Ketua Pengarah Perkhidmatan Perubatan Malaysia & Ors [1997] 2 MLJ 538; [1997] 2 CLJ 564, CA (refd)
Sebekai Plantation Sdn Bhd v The Superintendant, Land and Surveys, Bintulu (Bintulu High Court Land Reference No 15-04-2008 (BTU)), HC (refd)
Seruan Gemilang Makmur Sdn Bhd v Badan Perhubungan UMNO Negri Pahang Darul Makmur (via his secretary Dato' Ahmad Tajudin b Sulaiman) [2010] 8 MLJ 57, HC (folld)
Shaharuddin bin Ali & Anor v Superintendent of Lands and Surveys Kuching Division & Anor [2004] 2 MLJ 555; [2004] 4 CLJ 775, HC (refd)
Shin Yang Quarry Sdn Bhd v Pusaka KTS Forests Plantation Sdn Bhd [2009] MLJU 603; [2009] 9 CLJ 840, HC (refd)
Superintendent of Lands and Surveys, Bintulu v Nor Anak Nyawai & Ors [2005] MLJU 266, CA (refd)
Superintendent of Lands and Surveys, Miri & Ors v Madeli Salleh (suing as administrator of the Estate of the Deceased, Salleh bin Kilong, [2008] 2 MLJ 677; [2007] 6 CLJ 509, FC (refd)
TR Madel Anak Kandou & Ors v BBC Estate V Sdn Bhd & Ors (Civil Suit No 22–2–2005 (BTU)) (unreported); [2011] MLJU 520, HC (refd)
Tasja Sdn Bhd v Golden Approach Sdn Bhd [2011] 3 CLJ 751, FC (refd)
Teh Guan Teik v Inspector-General of Police & Anor [1998] 3 MLJ 137; [1998] 3 CLJ 153, FC (refd)
Tong Lee Hwa & Anor v Lee Yoke San [1979] 1 MLJ 24; [1978] 1 LNS 218, FC (refd)
Wandsworth London Borough Council v Winder [1985] AC 461, HL (folld)
Wong See Lee & Ors v Ting Siik Lay [1997] 2 CLJ 205, FC (refd)

Legislation referred to

Civil Law Act 1956 s 7(5)
Criminal Procedure Code ss 9, 10
Federal Constitution art 132
Land Surveyors Ordinance 2001 s 2
Public Authorities Protection Act 1948 s 2(a)
Rules of the High Court 1980 O 1 r 1A, O 14A, O 15 r 16, O 18 r 19, O 32 r 1, O 89 r 5, O 92 r 4
Sarawak Land Code (Cap 81) ss 13, 13(1), 15, 15(1), 28, 28(2), (3), 131(1), 132(1), (1)(f), 173, 202

See Chee How (Baru Bian) for the plaintiff.
Leonard Shim (Reddi & Co Advocates) for the first defendant.
Joseph Chioh (SAG) for the second and third defendants.

John Ko Wai Seng JC:

RULING

BACKGROUND

Action

[1] The plaintiffs filed the writ and statement of claim herein dated 20 January 2010 as Kuching High Court Suit No 22–23–2010-II and it was subsequently transferred to become Bintulu High Court Suit No 21–02–2011 (BTU).

[2] The first defendant is the registered proprietor of the provisional lease ('provisional lease') for that parcel of land containing an area of 650 hectares, more or less and described as Lot 16 Block 3 Sangan Land District ('Lot 16').

[3] The plaintiffs bring this action on behalf of themselves and all other occupiers, holders and claimants of native customary right ('NCR') land at Sungai Sekabai, Sungai Tajem, Tatau, Bintulu, Sarawak ('NCR land') in which Lot 16 is located against the first defendant as the registered owner of Lot 16 and the second and third defendants for issuing title over Lot 16 to the first defendant.

[4] From the plaintiffs' statement of claim the extracts of the relevant orders and reliefs the plaintiffs sought against the first defendant are:

(a) a declaration order that the plaintiffs had created and/or acquired and/or inherited native title and/or Native Customary Rights (NCR) over the area as claimed by the plaintiffs respectively referred to and/or edged in red marked in the locality map marked as 'M' and annexed hereto herein;

(b) a declaration order that this native title and/or rights preclude the first defendant from impairing and/or abridging the plaintiffs' said native title and/or NCR;

(c) a declaration that the acts of the second and/or third defendants in issuing the said provisional leases, Lot 15–16 Block 3, Sangan Land District, ('the said provisional leases') in so far as it impairs the plaintiffs' NCR over the said NCR land, is wrong bad and/or void;

(d) a declaration order that the issuance of the said provisional leases to the first defendant in as far as the extent of that area under the said provisional leases overlaps and/or covers the plaintiffs' NCR land is unlawful, improper, unconstitutional and therefore null and void, for want of extinguishment of the plaintiffs' NCR over the said land;

(e) alternatively, a declaration that the issuance of the said provisional leases was subject to the native title and/or native customary rights and/or usufructuary rights of the plaintiffs in or over the said NCR land and that the said provisional lease do not affect the plaintiffs' said title and/or rights there;

(f) …

(g) a declaration order that the area so included in the said provisional leases as claimed by the plaintiffs as part of their NCR land, the same be excised out of the area of land under the said provisional leases;

(h) a prohibitory injunction restraining the first defendant and/or their employees, servants and/or agents from trespassing, clearing, using or occupying and commencing their development project on the plaintiffs' said NCR land;

(i) alternatively, a mandatory injunction against the first defendant and/or its employees, servants and/or agents to cease operations and remove all structures and their equipments or machineries from the plaintiffs' said NCR land forthwith;

(j) a declaration that the said order dated 20 November 2009 is not binding and/or have no effect on the plaintiffs;

(k) a declaration order that demolition of the plaintiffs houses and/or farm houses is unlawful and illegal;

(l) damages to be assessed by the registrar;

(m) costs of this action; and

(n) any further order or relief deems fit and proper by this Honourable court.

Undisputed facts of the case

[5] The plaintiffs in this action had commenced an earlier suit in 1999 against Borneo Pulp Plantation Sdn Bhd and Borneo Pulp & Paper Sdn Bhd and superintendent of lands and surveys Bintulu in Kuching High Court Civil Suit No 22–28–99-I ('first suit'). The NCR claim in the first suit was to 'the lands at Rumah Luang/Rumah Nor in Sungai Sekabai, Sungai Tajem and Sungai Ipuh, Sebauh, Bintulu, Sarawak' more particularly set out and edged red in the map marked 'A' ('original NCR land' and 'map A' respectively) annexed to the statement of claim in the first suit ('first statement of claim').

[6] The plaintiffs in the para 3(a) and (d) at p 5 of the one statement of claim (exh 'GBI1' of Ghazali's affidavit) claimed, inter alia, the following:

((a)) The Plaintiffs aver that at all material times, they have acquired native customary rights over the lands at Rumah Luang/Rumah Nor in Sungai

Sekabai, Sungai Tajem and Sungai Ipuh, Sebauh, Bintulu Division, Sarawak. The said lands are more particularly set out in a map annexed hereto and marked 'A' and edged in red are the areas within which the Plaintiffs claim the said rights (hereinafter referred to as 'the said native customary land')

((d)) The said native customary land, which is comprised of land and forest and/or high forest ('temuda', 'pulau' and 'pemakai menoa') is not just a source of livelihood but also constitute life itself, as the said land is also fundamental to the Plaintiffs' social, cultural and spiritual survival as native people.

[7] The plaintiffs in the first suit had stated in para 3.2 at p 2 of the statement of agreed facts dated 26 October 2000 (exh 'AJA-1' of Awang's affidavit):

> The boundary of the area over which the Plaintiffs and those whom they claim to represent claim to have acquired native customary rights and part of the boundaries of Lot 591 and Lot 126 as shown in the topographical map of 1:50,000 scale as page 172 of the Bundle of Agreed Documents (or Exhibit P172) filed herein are accurate.

[8] The Kuching High Court in the first suit gave judgment ('High Court judgment') in favour of the plaintiffs (*Nor Anak Nyawai & Ors v Borneo Pulp & Paper Sdn Bhd & Ors* [2001] 6 MLJ 241) on 12 May 2001 and Ian HC Chin J made, inter alia, the following order in his judgment that defined 'the disputed area' as follows (exh 'GBI5' of Ghazali's affidavit):

((a)) the Plaintiffs are entitled to exercise native customary rights in a disputed area measuring 672.08 hectares approximately;

((d)) the disputed area is to be reckoned by reference to the map admitted in evidence during the trial as Exhibit P172 following as closely as possible the boundary of the disputed area that has been marked on the map.

The map, exh P172 from the first suit (exh 'GBI6' of Ghazali's affidavit) ('exh P172') shows the entire area of the original NCR land (18,952 acres) claimed by the plaintiffs in the first suit including the balance of the undisputed area (17,227 acres).

[9] The High Court judgment (see *Nor Anak Nyawai*'s case at p 253) had incorporated a simplified version of the map exh P172 (or map A) ('judgment map'). This judgment map is also reproduced by the Court of Appeal in their judgment reported in *Superintendent of Lands and Surveys, Bintulu v Nor Anak Nyawai & Ors* [2005] MLJU 266 (see p 3 of exh 'GBI8' of Ghazali's affidavit). The judgment map is reproduced in the First Schedule hereto.

[10] In the judgment map it has this caption: 'Boundary of land over which

the plaintiffs' claim native customary right' near where the part of Lot 15 is to have encroached into the original NCR land.

[11] Now in this action, by para 3(a) of the plaintiffs' statement of claim the same plaintiffs are claiming as the NCR land, all the lands in 'Rumah Luang/Rumah Nor in Sungai Tajem, Sungai Tajem and Sungai Ipuh, Sebauh, Bintulu Division, Sarawak' as delineated in red in the map marked 'M annexed to Plaintiffs' statement of claim ('map M'). Map M is set out in the Second Schedule hereto.

[12] Based on the map M the boundary of the NCR land claimed has been extended beyond the original NCR land to include about 2/3 of the area of the first defendant's Lot 16 (coloured blue) and half of the area of adjoining Lot 15 (coloured red). This can be seen when we compare the boundary of the original NCR land in either exh P172 or map A or the judgment map, in relation to the map in exh 'GBI7' of Ghazali's affidavit ('the defendant's map'). Lot 16 can be seen to be located outside the boundary of the original NCR land and about 1/6 of the land area of Lot 15 (or 178.424 hectares) is located within the original NCR land. The defendant's map is set out in the Third Schedule hereto.

[13] Further, the plaintiffs and the defendants in the first suit had all appealed by Court of Appeal Civil Appeals No Q-01–42 of 2001 and Q-20–504 of 2001 against the decision of the High Court in the first suit ('the appeals'). The Court of Appeal allowed the defendants' appeal and dismissed the plaintiffs' cross 'appeal' for damages on 8 July 2005.

[14] The plaintiffs did not make any reservation about the fixing of the extent of the plaintiffs' claimed boundary based on the original NCR land in the first suit nor cross appeal on the High Court's acceptance of this boundary limitation notation onto the judgment map right up to their appeals to the Court of Appeal.

[15] The plaintiffs' applications for leave to appeal to the Federal Court against the appeals were dismissed.

[16] The first defendant's right as the registered proprietor of Lot 16 has been recognised by the court order dated 20 November 2009 ('possession order') in High Court Originating Summons No 24–74 of 2008 (exh 'GBI9' of Ghazali's affidavit) involving the fourth plaintiff and persons in occupation who were however not heard because they had not joined in as defendants under O 89 r 5 of the RHC 1980. The possession order had ordered all the persons in occupation thereon do give possession of Lot 16 to the first defendant.

[17] An appeal by the first, second and third plaintiffs had been lodged against this possession order on 17 December 2009 but has since been dismissed on the procedural technicality of not being joined as defendants.

[18] Lastly on 10 December 2009, the Bintulu High Court issued a writ of possession in Application for Execution No 38–09–2009(BTU) (exh 'GBI10' of Ghazali's affidavit) ('writ of possession) to recover possession of Lot 16 from the fourth plaintiff and the other occupiers.

The application

Application

[19] The first defendant's application under O 14A, O 18 r 19, O 32 r 1 and O 92 r 4 of the RHC 1980 is for the following issues to be decided:

(a) whether the plaintiffs' action herein is res judicata and/or barred by issue estoppel as a result of the High Court Suit No 22–28–99-I between *Nor Anak Nyawai & 3 Ors v Borneo Pulp & Paper Sdn Bhd & 2 Ors* ('the first suit') and the Court of Appeal's decision in Civil Appeals No Q-1–42 of 2001 and Q-20–504 of 2001 ('the appeals') and Originating Summons No 24–70 of 2008;

(b) whether the plaintiffs' claims and the reliefs sought are barred by reason of s 2 of the Public Authorities Protection Act 1948 ('PAPA 1948') and/or Item 97 of the Schedule to the Limitation Ordinance (Cap 49) and/or s 202 of the Sarawak Land Code (Cap 81) ('Land Code');

(c) whether the plaintiffs' action is maintainable as the plaintiffs ought to have filed an action by way of judicial review of the administrative action of the issuance of the documents of title to Lot 16, Block 3, Sangan Land District; and

(d) whether the plaintiffs could apply for or be entitled to the remedies, reliefs or orders prayed for in the statement of claim as against the first defendant's title, which is indefeasible.

Pleadings

[20] The court is referred to the following documents filed:

(a) writ of summons dated 22 January 2010 and statement of claim dated 20 February 2010 (the plaintiffs' statement of claim)

(b) the first defendant's defence dated 1 July 2010;

(c) the first defendant's summons in chambers under O 14A, O 18 r 19, O 32 r 1 and O 92 r 4 dated the 9 February 2012 (the 'application'); A

(d) the first defendant's affidavit in support affirmed on 7 February 2012 ('Ghazali's affidavit');

(e) the plaintiffs' affidavit in opposition affirmed on 1 March 2012 ('Baru's affidavit'); and B

(f) the first defendant's affidavit in reply affirmed on 14 March 2012 ('Awang's affidavit');

C

SUMMARY DISPOSAL UNDER O 14A

[21] Learned counsel for the plaintiffs had submitted that the issue of law has to be discernable from the pleadings and the court should not be required to decide what point of law arises by citing *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2008] 2 MLJ 812; [2007] 6 CLJ 741. D

[22] Learned counsel for the first defendant submitted in reply that the plaintiffs' contention is without merits as their application is supported with undisputed contemporaneous documents, judgments and court orders and the statement of agreed facts dated 26 October 2000 in the first suit for deciding the four points of law framed. E

[23] O 14A of the RHC 1980 reads: F

(1) The court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the court that:

(a) such question is suitable for determination without the full trial of the action; and G

(b) such determination will finally determine the entire cause or matter or any claim or issue therein.

(2) Upon such determination the court may dismiss the cause or matter or make such order or judgment as it thinks just. H

[24] In *Petroleum Nasional Bhd v Kerajaan Negeri Terengganu & Another Appeal* [2004] 1 MLJ 8; [2003] 4 CLJ 337 Mohd Noor Ahmad JCA observed that (p 19 (MLJ); p 351a (CLJ)): I

> In a nutshell, the order enables the court to determine any *question of law* or construction of document where it appears to the court that *such question is suitable for determination without the full trial* of the action and *such determination will finally determine the entire cause or matter or any claim or issue therein.*

[25] Mohd Noor Ahmad JCA later added (*ibid* p 31 (MLJ); p 364h (CLJ)):

> In our view, even if the case appears to be or is complicated it does not mean that the court must shun away from considering the applicability of O 14A and O 33 r 2 in relation to the questions of law posed which are clear and definite and the issues are clear cut. Real and serious attempt must be made to identify the material facts pleaded which are obviously undisputed or which should not have been disputed and then to apply the relevant rule to the facts as found. There are authorities in support of the proposition that merely because an issue of law takes a little longer to determine does not mean that the court should refuse the application (see *Korso Finance Establishment Anstalt v John Wedge*,).

[26] In *Bato Bagi & Ors v Government of the State of Sarawak* [2011] 6 CLJ 387, Sulaiman Daud JCA had further elaborated on this at para 17:

> It is well settled that an issue is only suitable for determination under O 14A if the points of law to be determined thereunder have been stated in clear and precise terms, and the facts disclosed by the pleadings and affidavit evidence are sufficient for the court to make such determination which would be final as to the entire cause or matter, (see *Allen v Gulf Oil Refining Ltd* [1980] QB 156, and *Seloga Jaya Sdn Bhd v UEM Genisys Sdn Bhd* [2008] 2 CLJ 686.)

[27] Based on the undisputed facts and the four issues of law arising posed by the first defendant's application from them, the court considers it appropriate to deal and decide on these four issues on the application of the law which may finally dispose of the case summarily.

ISSUES

Res judicata and/or issue estoppel

[28] Learned counsel for the first defendant submitted that the plaintiffs' action against the first defendant herein is res judicata and/or barred by issue estoppel by reason of the judgment in the first suit, the Court of Appeal's judgment in the appeals, the possession order and the writ of possession.Though it was accepted by the parties to the appeals in the first suit that the disputed area was only a portion of the original NCR land claimed by the plaintiffs to be under NCR based on the judgment map. The judgment map was then accepted and inserted in the High Court judgment and was again adopted and reproduced in the appeals judgment of the Court of Appeal.

[29] Learned counsel for the plaintiffs confirmed that the area claimed by the plaintiffs in the first suit and the present suit is basically the same NCR land (para 5 of Baru's affidavit). He submitted that for the first suit the parties had agreed before the trial that only the disputed area would be the subject matter

of the trial in the first suit and the extent of the original NCR land as demarcated in the judgment map was not litigated on. The Map M attached to the statement of claim is properly surveyed and demarcates the actual boundary of the plaintiffs' NCR land to include parts of Lots 15 and 16 (see the defendant's map).

THE LAW

Distinction between res judicata and issue estoppel

[30] In *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189, the Supreme Court held:

> (1) When a matter between two parties has been adjudicated by a court of competent jurisdiction, they and their privies are not permitted to litigate once more the res judicata, as the judgment becomes the truth between such parties. An estoppel per rem judicatum has been created as a result.
>
> (2) There are two kinds of estoppel per rem judicatum, ie cause of action estoppel and issue estoppel. The *cause of action estoppel prevents reassertion of a cause of action which has been determined in a final judgment by the same parties.* On the other hand, the *issue estoppel prevents contradiction of the correctness of a final judgment by the same parties in a subsequent proceeding. Further, the parties are also prevented from asserting a cause of action or issue which should have been brought forward in the earlier action, but was not, whether deliberately or inadvertently.*
>
> (3) Unlike an ordinary estoppel which should be pleaded, the court has the inherent jurisdiction to dismiss an action by applying the doctrine of res judicata, which is an estoppel based on public policy, even if it has not been pleaded, as public policy requires that there should be finality in litigation. (Emphasis added.)

Not party to first suit

[31] The fact that the first defendant was not a party but the second defendant was a party to the first suit, in such an instance this court on similar circumstances had ruled in *TR Madel Anak Kandou & Ors v BBC Estate V Sdn Bhd & Ors* (Civil Suit No 22–2–2005 (BTU)) (unreported); [2011] MLJU 520 as follows (at p 12):

> If that is the case according to *Seruan Gemilang Makmur Sdn Bhd* where VT Singham J (at para 25 at p 831) had further similarly held:

> *[25] Although the party sued in this civil suit is not the same party as in the first civil suit the issues raised and the reliefs sought in both the civil suits are similar. Accordingly, this court is of the considered view that the substantial duplication of issues and reliefs sought in both the civil suits amounts to multiplication of actions. In the circumstances, this court finds that this civil suit is in fact vexatious, frivolous, and scandalous and is an abuse of the process of the court and ought to be struck out having regard to the justice of the case.* It is important to be reminded that the doors of justice are open to litigants who have a legitimate or genuine cause of action against his or her adversary and should not be permitted to abuse the entry granted to this sacred institution. (Emphasis added.)

[32] The boundary of the original NCR land claimed by the plaintiffs was an issue in the first suit and it would appear to the court applying the ratio of *Seruan Gemilang Makmur Sdn Bhd v Badan Perhubungan UMNO Negri Pahang Darul Makmur (via his secretary Dato' Ahmad Tajudin b Sulaiman)* [2010] 8 MLJ 57 the findings on the boundary can by res judicata be applied to bind the plaintiffs in this suit even if the first defendant was not a party to it.

Judgment and judgment map

[33] For res judicata to apply, it is necessary for the court to consider the judgment to see what it actually decided according to *The Pacific Bank Bhd v Chan Peng Leong* [1998] 2 MLJ 613; [1998] 2 CLJ 440 where Gopal Sri Ram JCA (as he then was) had held as follows (pp 619–620; 448):

> In my judgment, it is of the essence, in cases of this nature, when the plea of res judicata is taken, to identify with precision the issue that was decided in the earlier proceedings, which it is contended operates as a bar to relitigation because:
>
> … to constitute a res judicata, the earlier judgment must, in terms of the Privy Council decision in *Kok Hoong v Leong Cheong Kwong Mines Ltd* [1964] MLJ 49, 'necessarily and with precision' determine the point in issue (per Chang Min Tat FJ in *Tong Lee Hwa & Anor v Lee Yoke San* [1978] 1 LNS 218; [1979] 1 MLJ 24, affirmed on appeal to the Privy Council in [1981] 1 MLJ 54).

[34] In *Tong Lee Hwa & Anor v Lee Yoke San* [1979] 1 MLJ 24; [1978] 1 LNS 218, the Federal Court had held as follows:

> At the hearing of the appeal, it was put to counsel for the appellants that to constitute a res judicata, the earlier judgment must, in terms of the Privy Council decision in *Kok Hoong v Leong Cheong Kwong Mines Ltd*, *'necessarily and with precision'* determine the point in issue, and he was asked to indicate to the court how the earlier judgment did necessarily and with precision determine the liability of the appellants to pay the respondent for work done for them at their request. He did not do so. We do not, with respect, see how he could succeed. (Emphasis added.)

[35] The court agrees with learned counsel for the plaintiffs that reading the judgment (*Nor Anak Nyawai*'s case at p 773 b—e and p 836 b) and appeals' judgment (*Superintendent of Lands and Surveys, Bintulu v Nor Anak Nyawai & Ors* [2005] MLJU 266 at para 22 p 267), the first suit and the appeals were only concerned on deciding whether the plaintiffs had established their NCR over 'the disputed area' upon which the sublessee of the land had trespassed onto. 'The disputed area' was within the original NCR land claimed as the NCR of the plaintiffs as marked in the judgment map. This is clear from paras (a) and (d) of the sealed copy of the extracted judgment (exh 'GBI5' of Ghazali's affidavit)

[36] The court finds that the status of the plaintiffs' claim over the original NCR land less 'the disputed area' remains unadjudicated upon because it was never touched on or decided by adjudication in the judgment and the appeals. On record the second defendant here was the third defendant in the first suit and had seen fit to agree to limit the decision in the first suit to decide on the status of 'the disputed land' leaving the rest of the original NCR land claimed by the plaintiffs to be left undecided. Insofar as the judgment map was used in the first suit by its reproduction in the judgment and the appeals' judgment, the purpose is clearly to identify for adjudication where 'the disputed area' is. The court also finds that both courts never pronounced their decision 'necessarily and with precision' on the boundary issue of the original NCR land by their incorporation of the judgment map.

[37] Since the issues on the limits of and the validity of the demarcation of the boundary of the original NCR was never adjudicated on, res judicata based on the judgment map cannot be used to bar another suit to claim for the rest of the original NCR land or as enlarged after proper survey to include a part of the first defendant's adjoining land. This however is different from using the conduct and admissions of the plaintiffs in the first suit on the boundary of the original NCR land to be used in evidence in this suit to discredit the plaintiffs' claim herein to include the first defendant's land.

[38] The court finds that res judicata does not apply by reason of the judgment and the appeals or the judgment map demarcating the original NCR land of the plaintiffs to bar the plaintiffs from taking out another action to claim for the enlarged NCR land after proper survey to include the first defendant's land in this suit.

[39] The court finds that issue estoppel by the judgment or through the judgment map does not arise on the rest of the original NCR land because it has been found that the parties in the first suit had agreed that only 'the disputed land' would be adjudicated upon leaving the rest of the original NCR land presumably to be decided upon by another suit. That being the case there

being no adjudication on the rest of the original NCR land, issue estoppel will also not arise against the plaintiffs' failure to include the part of the first defendant's land to be claimed as a part of the original NCR land which can all now be claimed in this suit.

Possession order and writ of possession

[40] The first defendant relying on the indefeasible title of the provisional lease has been able to get an order to acquire vacant possession against the fourth plaintiff and all the persons in occupation thereon, presumably including the other plaintiffs herein.

[41] The question to the court is: Can res judicata and issue estoppel be raised by the possession order and writ of possession to stop plaintiffs from claiming their NCR land when they have 'lost' possession of the area in the first defendant's land that is in their NCR land?

[42] Again we have according to the cases of *The Pacific Bank Bhd* and *Tong Lee Hwa* to go 'necessarily and with precision' to determine the point in issue decided by the possession order and writ of possession. These are the relevant extracts from the grounds of decision granting the possession order (*In the matter of Lot 16 Block 3 Sangan Land District, Tatau Land Sdn Bhd v The persons in occupation of Lot 16 Block 3 Sangan Land District, Ulu Tatau, Bintulu Division, Sarawak* (Originating Summons 24–70 of 1980) (unreported) (in line 25 p 1):

> The affidavit in support is affirmed by its director, Ghazali bin Ismail. He deposed that when the land was alienated, the plaintiff had ascertained that there were no native claims in the said area. However, it has been brought to the attention of the plaintiff that some unnamed persons are in occupation of the land. The plaintiff had not given them permission to occupy the said land.

[43] (At line 31 p 3 of *In the matter of Lot 16 Block 3 Sangan Land District*):

> Similarly, in this instant case, the deponent of the affidavit in opposition had not applied to be joined as defendant. The others who are in physical occupation of the land in question have not done so either. In the premises, the case must be treated as if no defendant has come forward to defend the action of the plaintiff. The purported affidavit in opposition of Lani anak Taneh is therefore not allowed to be read to oppose the application of the plaintiff.
>
> I shall now consider whether the application of the plaintiff should be granted. The plaintiff has deposed that they are the registered owner of the land in question and therefore have an interest in the 5 land. They have deposed that they had not granted permission or licence to the present occupants. They have deposed that unnamed persons have occupied the said land and that they have refused to divulge their

identities despite being served with the Originating Summons. As the pre-conditions of Order 89 has been satisfied and no one has applied to be joined as a defendant, I shall grant the application as prayed. No order as to costs.

[44] The possession order states:

IT IS ORDERED that the Plaintiff, Tatau Land Sdn Bhd do recover possession of Lot 16, Block 3, Sangan Land District and all the persons in occupation thereon do give possession of the said land to the Plaintiff.

[45] Relying on the possession order the writ of possession has been issued requiring 'all the persons in occupation thereon do give possession of the said land to the first defendant'.

[46] The possession order was acquired by way of technical default that disallowed an interested party to be heard and which had ordered the right of possession to the first defendant relying on the provisional lease to give them indefeasible title to their land within the plaintiffs' NCR land.

[47] From the grounds for the possession order and the terms of the writ of possession the court finds the following:

(a) the possession order was acquired in default on a technicality that not being joined as defendants, the interested persons were not heard to raise an issue against the application for possession;

(b) the possession order was acquired in default on a class of persons without specifically naming any defendants;

(c) the writ of possession was directed against a class of persons without specifically naming any defendants that were disclosed by then; and

(d) the grant of the possession order and the writ of possession based on title given by the provisional lease did not actually adjudicate 'necessarily and with precision' the validity of the provisional lease to extinguish NCR rights of the plaintiffs and because the 'title survey' was not completed for the issue of the lease.

[48] It appears to the court that though some of the plaintiffs were present they were not given the opportunity to be heard or their affidavit used because of failure to formally join as defendants, though O 89 r 5 of the RHC 1980 allowed joinder at any stage of the proceedings and O 1 r 1A of the RHC 1980 required the court to have regard to the justice of the case and not only to technical non compliance of the rules. In considering the grant of the possession order the learned trial judge was led by the first defendant's affidavit to treat the provisional lease as indefeasible as being on par with a lease which

when considered later on in the context of being faced with an NCR claim is shown to be otherwise. The plaintiffs on the facts could have raised a triable issue on the first defendant's application for possession. The issue of whether the defendants' provisional lease would override the plaintiffs' NCR in Lot 16 was never truly adjudicated upon. The title survey is not completed for issue of the lease and NCR claims are not extinguished by the issue of the provisional lease remain valid. Though the court finds that the merits should lie with the plaintiffs in their contention that they are not bound by res judicata and issue estoppel by the peculiar facts of their case in the possession application of the first defendant, but the law on res judicata and issue estoppel is not in their favour.

[49] Learned counsel for the first defendant had cited the case of *Low Yin Kow @ Loo Ah Bah v Tor Len Hua* [2002] MLJU 358, where the High Court had held:

> Still, it could be said that with regard to the action itself, that the statement of claim merely raised matters which could and should have been litigated in 72–856–1995. But it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. 'The locus classicus of that aspect of res judicata is the judgment of Lord Wigram VC in *Henderson v Henderson* [1843] 3 Hare 100 115, where the judge says: '… where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under certain circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, only because they have from negligence, inadvertence, or even accident, omitted part of their case. *This plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time*' (Emphasis added.)

[50] Learned counsel for the first defendant had also cited *Pembinaan KSY Sdn Bhd v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 100; [1991] 1 CLJ (Rep) 343, where the Supreme Court held that even a default judgment is good and enforceable:

> The petition should not have been set aside. The conclusion of the learned judge was misconceived. *The default judgment obtained by the petitioner against the respondent was a good and enforceable judgment until it has been set aside.* (Emphasis added.)

[51] There is no question that the plaintiffs' NCR claim could have been raised as a defence to resist the application for the possession order to make it become a triable issue if the plaintiffs had been heard. The fact that the possession order was acquired without the plaintiffs being heard nonetheless

remains binding and enforceable until set aside. This suit was filed on the 22 January 2010 after the possession order was granted on 20 November 2009 and their appeal against it was dismissed by the Court of Appeal and on the cited authorities res judicata and issue estoppel had set in.

[52] It may be different if the plaintiffs had included a prayer in this suit to set aside the possession order and writ of possession as being null and void on the basis that it being a PL, it has to recognise NCR claims and that had been represented otherwise before the learned trial judge. In other words this inclusion raises a different issue to be triable as part of this suit to prove their NCR in Lot 16 that was never adjudicated on to stall a plea of res judicata. If they can then prove their NCR land in Lot 16, it will have to be excised to reduce the land area of the provisional lease. In turn this would render the possession order over the NCR land based on the provisional lease to be declared null and void through this suit.

[53] In addition the court from a reading of paras 18–24 of Ghazali's affidavit in particular para 24 states:

> 24. Further, I am advised by the first defendant's advocates and verily believe that the *Court of Appeal found that the said court order for delivery of vacant possession dated 20.11.2009 is binding on the plaintiffs and it is an abuse of the court process for the plaintiffs to apply for an injunction in Kuching on 22.1.2010 against the execution of the order dated 20.11.2009 and the writ of possession granted by the Bintulu High Court on 10.12.2009.* The plaintiffs should have but did not apply for a stay of execution of the Bintulu High Court Order dated 20.11.2009. A copy of the draft order of the Court of Appeal dated 17.11.2011 is hereto exhibited and marked as 'GBI-11'. (Emphasis added.)

[54] From the decision of the Court of Appeal on 17 November 2010 setting aside of the injunction against the first defendant in this case on the basis of res judicata and issue estoppel arising from the possession order and the writ of possession, this court would also find that it is similarly bound not only by res judicata and issue estoppel but by stare decisis from the Court of Appeal's decision from adjudicating on the plaintiffs' claim for their NCR in Lot 16.

Is there res judicata and issue estoppel?

[55] To the first question as to whether the plaintiffs' action herein is res judicata and/or barred by issue estoppel as a result of:

(a) the first suit and the appeals by virtue of the inclusion of the judgment map, the court's answer is in the negative; and

(b) possession order and writ of possession, the court's answer is in the affirmative.

A LIMITATION AND INDEFEASIBLE TITLE

[56] The court will lump the issue of limitation and indefeasible title to be dealt together because a finding as to the legal nature of the provisional lease issued to the first defendant by the second and third defendants impacts both issues.

Limitation

Time bar

[57] Learned counsel for the first defendant submitted that the provisional lease for Lot 16 was issued under the Land Code by the second defendant, the superintendent of lands and surveys, Bintulu who acted in accordance with the directions of the third defendant, the Government of Sarawak and such written law on 23 December 2002. The plaintiffs only commenced the present action against the defendants on 20 January 2010 whereby there was a lapse of more than seven years since the issuance of the provisional lease for Lot 16 by the second defendant. Citing in support the case of *Jok Jau Evong & Ors v Marabong Lumber Sdn Bhd & Ors* [1990] 3 MLJ 427; [1990] 2 CLJ (Rep) 169, the Kuching High Court held:

> [4] Under s 2 of the Public Authorities Protection Act, any action taken to challenge the proclamation or the issue of the timber licence must be commenced within 36 months of the act complained of; no attempt was made by the plaintiffs to enforce any legal rights over the alleged area (although they were aware of the proclamation as far back as the 60's) for the alleged acts of dispossession until the present suit was filed; consequently the action of the plaintiffs is statute barred against the third defendants. Therefore, the action against the first and second defendants also fail as the proclamation and the timber licence are deemed to be valid. (Emphasis added.)

[58] See also *Alias Bin Ismail v Hairuddin Bin Mohamad & Anor* [1997] 2 MLJ 538; [1997] 4 CLJ 669; *Ballare Jabu & Ors v Merawa Sdn Bhd & Ors* (Miri Suit No 22–21–2007) (unreported); [2008] MLJU 953 and *Baltim Timber Sdn Bhd v Director of Forests & Ors* [1996] 4 MLJ 103 on forest timber licence time runs from its issue.

[59] Learned counsel for the plaintiffs submitted relying on *Balare Jabu & Ors v Merewa Sdn Bhd & Ors* [2011] 4 CLJ 751 where it was held that s 2 of PAPA or limitation does not apply where a declaratory relief is sought by a party (p 755).

[60] In *SR Katherine Lim KH v Ketua Pengarah Perkhidmatan Perubatan Malaysia & Ors* [1997] 2 MLJ 538; [1997] 2 CLJ 564, *Teh Guan Teik v*

Inspector-General of Police & Anor [1998] 3 MLJ 137; [1998] 3 CLJ 153 (FC), were referred to in *Balare Jabu*'s case. In Teh Guan Teik's case, although it was an application for judicial review, an objection was also raised on ground of limitation. Their Lordships were of the opinion that O 15 r 16 of the RHC 1980 is a statutory authority for a right to sue by declaration and makes it a point that it shall not be opened to objection even where no consequential relief is sought. At p 168 of Their Lordships' judgment Peh Swee Chin FCJ said:

> I would like to make a general observation before I end this judgment of mine, ie that claim for a declaration is a very efficient remedy for an aggrieved citizen against ultra vires actions of all public authorities or governmental bodies. It has no coercive force by itself, inter alia, so that no such a governmental body need feel the threat of such force. Thus if a person's rights are affected by an order from such a public authority, he can sue for a declaration of the impropriety of the said order and if he succeeds he can ignore the said order with impunity; see *Dyson v Attorney General* [1911] 1 KB 410; or if a government servant categorised under art 132 of the Federal Constitution is dismissed from his post, he can claim a declaration that he still holds it. See *Surinder Singh Kanda*.

Law on limitation

[61] The respective limitation periods under s 2 of the PAPA 1948, Item 97 of the Schedule to the Limitation Ordinance (Swk Cap 49 (1958 Ed) and/or s 202 of the Land Code are as follows:

> Section 2 of the Public Authorities Protection Act 1948 ('PAPA 1948') provides:
>
> > Where, after the coming into force of this Act, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect –
> >
> > > (a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within *thirty-six months* next after the act neglect or default complained of or, in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof;
> >
> > (Emphasis added.)

[62] In the recent case of *Tasja Sdn Bhd v Golden Approach Sdn Bhd* [2011] 3 CLJ 751, the Federal Court had held:

> (1) In an application for striking out under O 18 r 19(1) of the RHC on the ground of limitation to bring an action, a distinction must be made as to which provision of the law is used to ground such application. *If it is based on* s 2(a) of Public Authority

Protection Act 1948 or s 7(5) of the Civil Law Act, *where the period of limitation is absolute then in a clear and obvious case such application should be granted without having to plead such a defence.* (Emphasis added.)

[63] Item 97 of the Schedule to the Limitation Ordinance (Cap 49) provides that a suit for which no limitation period is provided for will be time barred six years from when the right to sue accrues.

[64] Section 202 of the Land Code limits the period to sue the Government for damages for deprivation of land in the register by a registered proprietor to three years from when the right to action accrues.

[65] For the reasons given on the legal nature of a provisional lease ('PL') later on, the court need not consider the applicable limitation issues raised by the first defendant in the context of a PL and would consider this to be more appropriate for decision when a declaration on a lease is faced by these same limitation pleas before the court.

Indefeasible title

[66] Indefeasibility of title is governed by s 132(1) of the Land Code which provides:

Subject to this Code, the registered proprietor of any estate or interest in land to which this section applies shall, except in the case of fraud, hold such estate or interest subject to the interests noted on the Register but free from all other interest. (Emphasis added.)

[67] Sections 13(1) and 15(1) of the Land Code governs the protection of NCR over land by providing:

13(1) Subject to the direction of the Minister under section 3(1 A), the Director may alienate State Land, other than Native Customary Land —

15(1) Without prejudice to sections 18 and 18A, State land shall not be alienated until all customary rights therein have been surrendered or terminated or provision has been made for compensating the persons entitled to such rights.

[68] Learned counsel for the first defendant submitted that since the first defendant by being the registered holder of the provisional lease is the registered proprietor of Lot 16 and the plaintiffs' NCR interests are not noted on the register, relying on s 132(1) of the Land Code the first defendant takes Lot 16 free of the plaintiffs' NCR claims.

[69] Learned counsel for the plaintiffs submitted that a PL was issued by

s 132(1) of the Land Code 'Subject to this Code' and it has to be read in relation to ss 13, 15 and 28 of the Land Code which prohibits alienation of State Land until NCR claims have been dealt with. A PL issued in contravention of the other provisions of the Land Code does not give indefeasible title to the PL holder. Learned counsel for the plaintiffs on the provision of 'subject to' linkage referred to *Public Prosecutor v Richard Kwan* [1970] 2 MLJ 286, where the Court of Appeal deliberating on the interpretation of the phrases 'Subject to this Code' and 'subject to the other provisions of this Code' in ss 9 and 10 of the Criminal Procedure Code where Wee Chong Jin CJ held at p 287:

> …the expressions 'subject to this Code' and 'subject to the other provisions of this Code' have exactly the same meaning and that these expressions which are found in sections 9 and 10 mean no more than *to draw the attention of everyone that the particular section in which either of these two expressions appear may be qualified by other provisions of the enactment*. (Emphasis added.); and

[70] *Wong See Lee & Ors v Ting Siik Lay* [1997] 2 CLJ 205 (at p 222) where the Federal Court had the occasion to accept the effect of 'Subject to this Code' by opining that this means that s 132(1)(f) 'must be read, inter alia, subject to s 173 …'.

[71] In order to answer questions two and four posed to the court, it is necessary first to consider the legal nature of the provisional lease issued over Lot 16 to the first defendant.

The legal nature of the provisional lease

[72] The court is perplexed by the stand taken by the plaintiffs and the first defendant that a wrongdoing by the second and third defendants occurred on the date of issue of the provisional lease for Lot 16 to the first defendant presupposing that the provisional lease automatically denied or has the effect of 'extinguishing' any NCR of the plaintiffs over the subject land. This is further compounded by the submission of learned counsel for the first defendant that the provisional lease gives indefeasible title to the first defendant against any NCR claims. In this respect learned counsel for the plaintiffs counters the indefeasibility issue by stating that the alienation in a PL was issued 'Subject to this Code' under s 132(1) of the Code and must comply with ss 13, 15 and 28 of the Land Code thereby on contravention it renders the alienation by a PL illegal, void and of no effect as against the plaintiffs' NCR land. The right provision viz s 28 of the Land Code was cited but unfortunately the wrong legal conclusion was being canvassed.

[73] The court is of the view that there is a failure to fully comprehend the

legal nature of a PL which is expressed to be issued subject to the survey to be completed according to s 28 of the Land Code which states:

> (1) *No State land shall be alienated under this Code unless and until the survey of the land has been completed* to the satisfaction of the Superintendent:
>
> Provided that, when *immediate survey of any state land is impracticable, the Superintendent may order that a provisional lease* in Form C in the First Schedule *be executed in favour of the person entitled*.
>
> (2) *Every provisional lease shall specify the approximate extent and area of the land included therein but shall not entitle the holder to a grant or lease of the whole area specified.*
>
> (3) Notwithstanding the payment by him of any rent in respect of the area stated, the registered proprietor of any provisional lease shall have *no right to registration of a lease* in Form B in the First Schedule *for an area equal to the area stated to be alienated if on survey such area is found not to be available.* (Emphasis added.)

[74] The legal nature of a PL was dealt by this court in the course of a ruling dated 27 September 2011 made on an application under O 14A of the RHC 1980 in the case of *Sebekai Plantation Sdn Bhd v The Superintendent, Lands and Surveys, Bintulu (unreported)* (Bintulu High Court Land Reference No 15–04–2008 (BTU)) (followed in *Derawan Sdn Bhd v The Superintendent, Lands and Surveys, Bintulu (and 2 other Land References)* [2012] AMR 259 at paras 21–23 pp 260–261). The issue in these two land reference cases was concentrated on whether compensation was payable for compulsory acquisition of part of the land of a PL made before the title survey was completed for issue of the lease for the subject land.

[75] The relevant finding to us from *Sebekai Plantation Sdn Bhd* is what consists of pre-PL rights that reduces the land area available for which compensation would not be payable after the survey for issue of the lease:

> Reading s 28(2) and (3) of the Code, in respect of the wording: 'if on survey such area is found not to be available' or in the not available special condition: 'only to such an area as the survey shows to be available', they do not in the court's view spell out clearly what is the defining cut-off date to be used to decide when a part of land held in a PL is 'found not to be available' or the 'survey shows to be available'. There is a need to construe based on the above cited authorities s 28 of the Code to find out what is the date to be used for the survey to check on its unavailability ie unavailability at the date of the issue of the PL or unavailability as from the date of the completion of the final survey for issue of the lease.
>
> *Obviously the literal version supports all pre-PL claims on the PL Land as making all such area claimed to be unavailable within the meaning of s 28(3) of the Code and the non available special condition.*

The word 'survey' is simply defined by *Federal Chambers Advanced English Dictionary* (2000 Ed) as:

(1) You survey something when you look at it or examine it at length or in detail, in order to get a general view.

(2) …

(3) Someone surveys an area of land when they measure height and distance in order to draw a detailed map.etc.

The court also finds the definitions of 'cadastral land survey', 'survey plan' and *'title survey*' in s 2 of the Land Surveyors Ordinance 2001 (Cap 40) useful in understanding what the term survey of land connotes for consistency of interpretation of statutory law which states:

'cadastral land survey' means any survey undertaken to mark, identify or determine the extent or boundary or the measurement, of any parcel or area of land and includes title survey;

'survey plan' means a plan prepared and signed by a land surveyor or a Government surveyor, recording the survey work done or undertaken by him;

'title survey' means *any survey which by the Code or any other written law is required for the purpose of or in connection with the issuance or registration of any document of title* or any instrument affecting or evidencing title to land or parcels within a building subdivided under the Strata Titles Ordinance, 1995 [Cap. 18], *and includes in connection therewith —*

(a) *the delimitation of the boundaries of any land, including State land and any land lawfully held under native customary rights;*

(b) the development and subdivision of land under Part X of the Code;

(c) the fixing, replacement and removal of boundary marks;

(d) any survey required for the correct inter-relation of boundaries or boundary marks; and

(e) the making and recording of all measurements and calculations relevant thereto and the drawing and reproduction of plans therefrom.

The choice of the word 'survey' of the land (as defined above) rather than 'checking' of the status of the land in s 28(2) of the Code and the not available special condition connotes in its literal sense that there may be something on the ground or PL Land to be surveyed (an over view) or for measuring the land at the date of the issue of the PL to make it not to be available for the Government to issue a Lease, meaning like a possible claim for Native Customary Rights over the PL land which will always be a pre-PL unavailability event. This interpretation is in line with and is the title survey as contemplated and defined by the the Land Surveyors Ordinance 2001 (Cap 40). (Emphasis added.)

[76] The issue of a PL based on the above interpretation of s 28 of the Land

Code which contemplates a survey before issue of title which is for intents and purposes to this court the 'title survey' as defined by s 2 of the Land Surveyors Ordinance 2001 (Cap 40) does not per se deny or have the effect of extinguishing NCR claims subsisting upon the subject land. Invariably the PLs will also have the additional special conditions attached to the issued PL which re-emphasis the reduction of land area due to recognition of subsisting rights after the title survey is completed. In this case it is found as special condition (iii) of the provisional lease (exh 'GBI-3' in Ghazali's affidavit):

> The holder of this provisional lease shall not be *entitled to a lease* of an area equal to the area above stated but only *to such an area as the survey shows to be available.* (Emphasis added.)

Limitation

[77] The above contrast with the issue of a lease shows that a lease has the effect of giving absolute indefeasible title to the registered land holder of the subject land when registered in his name as contemplated by s 132(1) of the Land Code. In other words a lease unlike a PL has the immediate effect of denying or extinguishing NCR or other interests that may be subsisting on the subject land by the adverse alienation to the registered owner by the authorities concerned. Limitation would run from the date of the registration of the lease.

[78] It is different for a PL, the court will refer to this court's decision in *Matu Tugang v Shin Yang Forestry Sdn Bhd & 2 Ors* (Bintulu High Court Suit No 21–03–2009 (BTU) (unreported) where limitation was also pleaded to commence on the date of the issue of a Licence for Planted Forest ('LPF').

[79] The LPF had a cl 22 that had reserved NCR claims by stating:

> Nothing in this Licence is deemed to affect rights which any native has, prior to the issue of this Licence, lawfully acquired over the said land under the Land Code or the Ordinance.

[80] Based on cl 22, this court in *Matu Tugang* had held:

> The court agrees with submission of learned counsel for the plaintiff that NCR rights are akin to land rights for which limitation sets in for every breach or trespass distinct from the last wrongful act. If the act in question extinguishes NCR (like that given by s 5(3) of the Land Code) then limitation would run from the date of the purported extinguishment. The LPF and provisional leases do not have this extinguishing effect on NCR because in the case of the LPF its cl 22(1) gives recognition to NCR subsisting on the land and s 28 of the Land Code read with the special conditions of the provisional lease is framed to hive out NCR claims. (See

ruling dated 27 September 2011 in Sebekai Plantation Sdn Bhd v The Superintendent, Lands and Surveys, Bintulu (unreported) (Bintulu High Court Land Reference No 15–04–2008 (BTU).)

Even though the LPF may have been issued on 19 November 1999 and this suit filed on 13 August 2009, it becomes an issue of fact which is not established by the pleadings or as undisputed facts before the court as to when the first defendant started encroaching onto the plaintiffs NCR land in order to establish whether limitation has set in under PAPA 1948 or the Limitation Ord (Swk Cap 49 (1958 Ed)).

[81] Similarly the legal effect of the issue of the provisional lease for Lot 16 to the first defendant by the second and third defendants on the terms as stated never denied or extinguished the plaintiffs' NCR claims. On the contrary as contemplated by s 28 of the Land Code and Special Condition (iii) here read with s 2 of the Land Surveyors Ordinance 2001 (Cap 40), a title survey has to be conducted which includes, inter alia: *'the delimitation of the boundaries of any land, including State land and any land lawfully held under native customary rights'* before a lease can be issued.

[82] The PL format is to allow pre-PL claims including the plaintiffs' NCR claims to be investigated by the survey and if valid, their claimed area would have to be excluded from the land area of the lease yet to be issued to the first defendant. This power to exclude NCR claimed lands was reserved by Special Condition (iii) and s 28(2) and (3) of the Land Code through the rider that the PL holder may get a lease of a lesser area than the original PL area after a title survey finds the claimed parcel as not available.

[83] The court finds that the act of issuing the provisional lease to the first defendant by the second and third defendants on the terms as elaborated is not an actionable wrong per se because it recognised the plaintiffs' right to claim NCR over Lot 16 during the title survey. The wrongful act will only occur, if the second and third defendants having been made aware of the plaintiffs' NCR claims proceed to issue a lease for Lot 16 to the first defendant which is yet to take place or on the day they proceed to evict them from the NCR land because of the provisional lease.

[84] The Court will find that since no actionable wrong is committed by the issue of the provisional lease to the first defendant by the second and third defendants, limitation does not run from 23 December 2002 as pleaded. If at all, limitation will commence to run when the second and third defendants had unequivocally denied the plaintiffs' their NCR claims lodged over Lot 16 based on the undisputed facts before the court that would be by the act of filing their defence on 12 July 2010. It could be earlier when the plaintiffs had notice of the infringement of their rights which can only be ascertained at a trial on the facts

as it is not evident from the undisputed facts before the court.

Indefeasible title

[85] In light of the court's exposition of the legal nature of a PL in *Sebekai Plantation Sdn Bhd* as applied in *Matu Tugang's* case, even though the PL is recognised as a document of title it is a qualified title subject to pre-PL rights claimed like NCR. According to s 28(2) and (3) of the Land Code and the Special Condition (iii) the registered holder of a PL will not be given a lease of such part of the PL *'to be alienated if on survey such area is found not to be available'.*

[86] With the reservation given in favour of pre-PL subsisting rights against the PL land then s 132(1) of the Land Code affords no protection to the PL holder as against claims for pre-PL subsisting rights like the NCR claim of the plaintiffs. The first defendant's expectation under a PL is to be given the whole area alienated but this expectation is subject to the limitation that he is not entitled to *'the whole area specified'* because *'if on survey such area is found not to be available.'* This unavailable reservation made by the Land Code and the special conditions in the PL in fact requires his expectation to be whittled down by the need to take into account the presence of valid subsisting pre-PL claims like the NCR claim of the plaintiffs.

[87] This need to ascertain pre-PL claims in the form of NCR claims in s 28 of the Land Code recognises and is in compliance with the statutory duty imposed on the second and third defendants by s 13(1) and 15(1) of the Land Code together with its legal consequences which is correctly stated by Her Ladyship in *Nikodemus Singai*'s case as highlighted below (at p 394F/G):

> *Native customary rights land should not be alienated, period. That is clear from s 13 and s 15(1) of the Land Code* but when it does, and I came back to what I have also said earlier, the claimant of these native customary rights land has a legitimate complaint against the issuer of the land title and should take issue with them; not the title holder unless they can prove fraud as stipulated in s 132(1) of the Land Code. (Emphasis added.)

[88] However the rest of Her Ladyship's observation (after the highlighted part) would be relevant when directed at dealing with a lease or grant in perpetuity and not as of right to a PL. With greatest respect, the court doubts whether this part of the decisions recognising 'absolute' indefeasibility on par with a lease on its issue to a PL holder against a NCR claim in *Nikodemus Singai* (at para 21 p 394c) and other similar cases would have been the same if the distinction between a PL and a lease was put for the consideration of the learned judges.

[89] The court finds that the issue of a PL based on the reservations imposed by s 28(2) and (3) of the Land Code and the Special Condition (iii) upon the registered holder of a PL to hive out pre-PL claims including NCR will not per se contravene ss 13(1) and 15(1) of the Land Code.

[90] The effect of the reservation for valid pre-PL claims on the PL land by s 28(2) and (3) of the Land Code and the Special Condition (iii) effectively waters down the indefeasible right given by s 132(1) of the Land Code to the registered holder of a PL. This means that a PL holder cannot raise indefeasible rights through the PL as a defence against any valid pre-PL claim including NCR like those of the plaintiffs over land held in a PL.

Legal rights of the provisional lease

[91] To the second question as to whether the plaintiffs' claims and the reliefs sought are barred by reason of s 2 of the Public Authorities Protection Act 1948 and/or Item 97 of the schedule to the Limitation Ordinance (Cap 49) and/or s 202 of the Land Code 1958 (Cap 81), the court's answer is in the negative. Limitation does not run from the date of issue of the provisional lease on 23 December 2002 which is not an actionable wrong per se. Limitation will run at the latest from the date of issue of the lease to Lot 16 (which has not happened) or from the date that the second and third defendants are shown to have denied the NCR claims of the plaintiffs as pre-PL rights ie on the undisputed facts before the court by the filing of their defence on 12 July 2010.

[92] To the fourth question as to whether the plaintiffs could apply for or be entitled to the remedies, reliefs or orders prayed for in the statement of claim as against the first defendant's title, which is indefeasible, the answer is in the positive because the provisional lease is not of the same caliber of a lease, the provisional lease is subject to pre-PL claims which includes plaintiffs' NCR claims with the consequence that the eventual lease issued may be for a reduced area to take into consideration valid pre-PL claims including NCR which makes such area as not available within s 28(2) and (3) of the Land Code and the Special Condition (iii) of the provisional lease.

CORRECT PROCEDURE: JUDICIAL REVIEW

[93] Learned counsel for the first defendant submitted that the plaintiffs had wrongly brought the present claim against the first defendant in private law, ie by way writ of summons and statement of claim dated 20 January 2010 when the plaintiffs' case clearly falls within the realm of public law in that the plaintiffs ought to have commenced the claim for the alleged ncr by way of judicial review of the second defendant administrative decision to issue the provisional lease for Lot 16 by reliance on *Shaharuddin bin Ali & Anor v*

Superintendent of Lands and Surveys Kuching Division & Anor [2005] 2 MLJ 555; [2004] 4 CLJ 775, *Shin Yang Quarry Sdn Bhd v Pusaka KTS Forests Plantation Sdn Bhd* [2009] MLJU 603; [2009] 9 CLJ 840 and *Jalang ak Paran & Anor v Government of The State of Sarawak & Anor* [2011] 3 MLJ 13; [2011] 3 CLJ 469 which all concluded (from *Shaharuddin Ali* 's case at p 556 (MLJ); p 776f (CLJ)):

> [3] *Although the plaintiffs claimed that their alleged rights were proprietary in nature, the fact remained that those rights were created or recognised by statute.* Therefore, their alleged rights were protected by public law and did not arise out of any private contract or arrangement between the plaintiffs and the government. *Accordingly, the plaintiffs' remedy to enforce or protect rights created or acquired or recognised in accordance with the provisions of the Land Code must be sought under public law and not private law. That being the case, the plaintiffs should have proceeded by way of O 53 of the RHC unless the exception to the general rule in O'Reilly v Mackman was applicable — which on the facts was inapplicable.*

[94] Learned counsel for the plaintiffs submitted that the plaintiffs are seeking a relief or remedy for infringement of rights protected by private law since NCR can be acquired through common law and not public law alone as recognised in the decisions in *Nor Anak Nyawai*'s case and *Superintendent of Lands and Surveys, Miri & Ors v Madeli Salleh (suing as the administrator of the Estate of the Deceased, Salleh bin Kilong)* [2008] 2 MLJ 677; [2007] 6 CLJ 509 and falls within two of the exceptions in *O'reilly*'s principle.

[95] The court will refer to the decision of *Matu Tugang v Shin Yang Forestry Sdn Bhd and 2 Ors* (High Court Suit No 21–03–2009 (BTU)) (unreported) on the correct court procedure to challenge the issue of a licence for planted forest subject to a NCR claim (at lines 555–650 pp 17–20):

> …, in *Merang Jok*'s case this court had applied the test from *Ahmad Jefri bin Mohd Jahri @ Md Johah v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145, and concluded that the issue of the challenge of the validity of the LPF is ancillary to the claim to establish NCR with the stated consequences (p 18):
>
> > The plaintiffs' case is simply a private law case with some incidental elements of public law because of the involvement of the state and its departments thereby taking it outside the scope of O 53 of the RHC 1980 and this is within the test propounded by James Foong FCJ in *Ahmad Jefri*'s case (at para (5) p 147) when he held:
> >
> > > (5) A challenge on the use of appropriate procedure is very much fact based. It is necessary for a judge when deciding on such a matter to first ascertain whether there is a public law element in the dispute. If the claim is based solely on substantive principles of public law than the appropriate process should be by way of O 53 of the RHC. If it is a mixture of public and private law, then the court must ascertain which of the two is predominant. If the claim has

substantial public law elements, then the procedure under O 53 of the RHC must be adopted. Otherwise it may be set aside on the ground that it abuses the court's process. *If the matter is under private law, though concerning a public authority it would be inappropriate to commence the action under O 53 of the RHC.* The courts should be cautious in allowing a matter that should be commenced by way of O 53 of the RHC, to proceed in another manner. (See also para 61 (*ibid*).) (Emphasis added.)

[96] The court will also refer to *Nikodemus Singai & Ors v Sibu Slipway Sdn Bhd & Ors* [2010] 10 CLJ 383, where Rhodzariah Bujang JC (as she was) when faced with the same issue arising from the issue of a logging licence and provisional leases over NCR land of the inhabitants had held as follows (p 389H):

[10] After giving the matter much thought, *I am of the view that cases involving claims of native customary rights such as this one are an exception to the O'Reilly's principle.* I came to this decision because the prosecution of the plaintiffs' right here is a genus in itself for by its very definition that right is largely unsupported by evidence; it is almost purely proved by oral evidence based on customs and tradition and is a peculiarity of only two states - Sabah and Sarawak. For the natives in these two states, - their rights to the land — to forage, to hunt, to fish and to cultivate the land, for it is not just a place to build a home but their very livelihood — this right is handed down one generation to the next. To tie them down to the *O'Reilly*'s principle when more often than not they would only know about the transgressions of their right when the land had already been dealt with by the state authorities (as in this case) is an irreparable injustice which the Law Lords in O'Reilly, I am sure would never have intended. (Emphasis added.)

[97] The court notes that on this procedural issue, in the Federal Court case of *Bato Bagi & 6 Ors v State Government of Sarawak* (Civil Appeal No 01–04–2011 (Q) consolidated with *Jalang ak Paran & Anor v State Government of Sarawak & Anor* [2011] 6 MLJ 297; Civil Appeal No 01–5–2011(Q) Richard Malanjum CJSS opined (pp 36–37):

101. Although it does, to a certain extent, fall within the realm of public law, *I am of the view that it tilts more towards the vindication of a private right which is recognised both under statute and at common law (which pre-existed statute).* As such, the natives should be at liberty to proceed by way of an ordinary civil suit. Another way of looking at it is to consider it as an exception to the *O'Reilly v Mackman* [1982] 3 All ER 1124 principle.

102. I therefore prefer to approve the recent the decision of the High Court in *Nikodemus Singai & Ors v Sibu Slipway Sdn Bhd & Ors* [2010] 10 CLJ 383 to that of *Shaharuddin bin Ali & Anor v Superintendent of Lands & Surveys, Kuching Division & Anor* [2005] 2 MLJ 555; [2004] 4 CLJ 775. (Emphasis added.)

[98] On the learned consideration expressed by Rhodzariah Bujang JC (as she was) in *Nikodemus Singa*i's case which was approved obiter by Richard Malanjum CJSS in the Federal Court, there is every reason in the interests of justice that such cases of natives claiming for NCR on land which incidentally is used to challenge and defeat the administrative action of the authorities in issuing licences for logging, planting trees or mining or for provisional leases which have encroached onto their NCR land should be constituted as a new exception to the *O'Reilly*'s principle. After all this is what Lord Diplock expressed in the *O'Reilly*'s case (p 285F):

> Whether there should be other exception should, in my view, at this stage in the development of procedural public law, be left to be decided on a case basis — a process that yourLordships will be continuing in the next case in which judgment it to be delivered today (*Cocks v Thanet District Council* [1983] 2 AC 286)

[99] This course of action not to allow a procedural objection to defeat substantive rights finds support from Robert Goff LJ in *Wandsworth London Borough Council v Winder* [1985] AC 461 (p 477):

> The principle remains intact that public authorities and public servants are, unless clearly exempted, answerable in the ordinary courts for wrongs done to individuals. … Before the expression 'public law' can be used to deny a subject a right of action in the court of his choice it must be related to a positive prescription of law, by statute or by statutory rules. We have not yet reached the point at which the mere characterisation of a claim as a claim in public law is sufficient to exclude it from the consideration of the court: to permit this would be to create a dual system of law with rigidity and procedural hardship for plaintiffs which it was the purpose of the recent reforms to remove.

[100] The court agrees with Lord Lowry in *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 All ER 705 when he opined (p 730a):

> …unless the procedure adopted by the moving party is ill suited to dispose of the question in issue, there is much to be said in favour of the proposition that a court having jurisdiction ought to let a case be heard rather than entertain a debate concerning the form of the proceedings.

[101] The Court will apply the decisions in the cases of *Merang Jok* and *Matu Tugang* that the writ procedure is suitable to be used for challenging a PL that encroaches onto the NCR of the inhabitants' land as concluded in *Matu Tugang* as follows (at lines 662–676 pp 20–21):

> After hearing the submissions from the parties the court sees no reason why it should change its position as held in *Merang Jok's case* and will find that the plaintiffs' case is substantially a claim for NCR over their land, which then impacts as an ancillary

issue on the validity of the LPF issued by the second and third defendants to the first defendant. The plaintiffs' case remains essentially a private law issue that has been correctly commenced as a writ action and need not be by way of judicial review under O 53. This falls within the first exception in *O'Reilly*'s case as quoted above and highlighted and accepted by James Foong FCJ in *Ahmad Jefri*'s case to become a private law matter rather than a public law matter. Otherwise, the court as contemplated by Lord Diplock in *O'Reilly*'s case and in the interests of justice will also hold that the claim for NCR which incidentally challenges as an ancillary issue an administrative act of the authorities is a new exception to the *O'Reilly*'s principle actionable by writ action in order not to allow substantive rights to be defeated by a procedural objection.

[102] On the third question posed for this court's decision as to whether the plaintiffs' action is maintainable as the plaintiffs ought to have filed an action by way of judicial review of the administrative action of the issuance of the documents of title to Lot 16, the courts' answer is in the positive in that the writ action is in order because of the substantial issues of fact arising from the plaintiffs' NCR claims and should be maintained.

CONCLUSION

[103] The court answers the first question as to whether the plaintiffs' action herein is res judicata and/or barred by issue estoppel as a result of the possession order and writ of possession in the affirmative with the result that the court will order:

(a) the writ and statement of claim dated 20 January 2010 against the first defendant be struck out; and

(b) the costs of this application and this action be awarded to the first defendant.

A

B

C

D

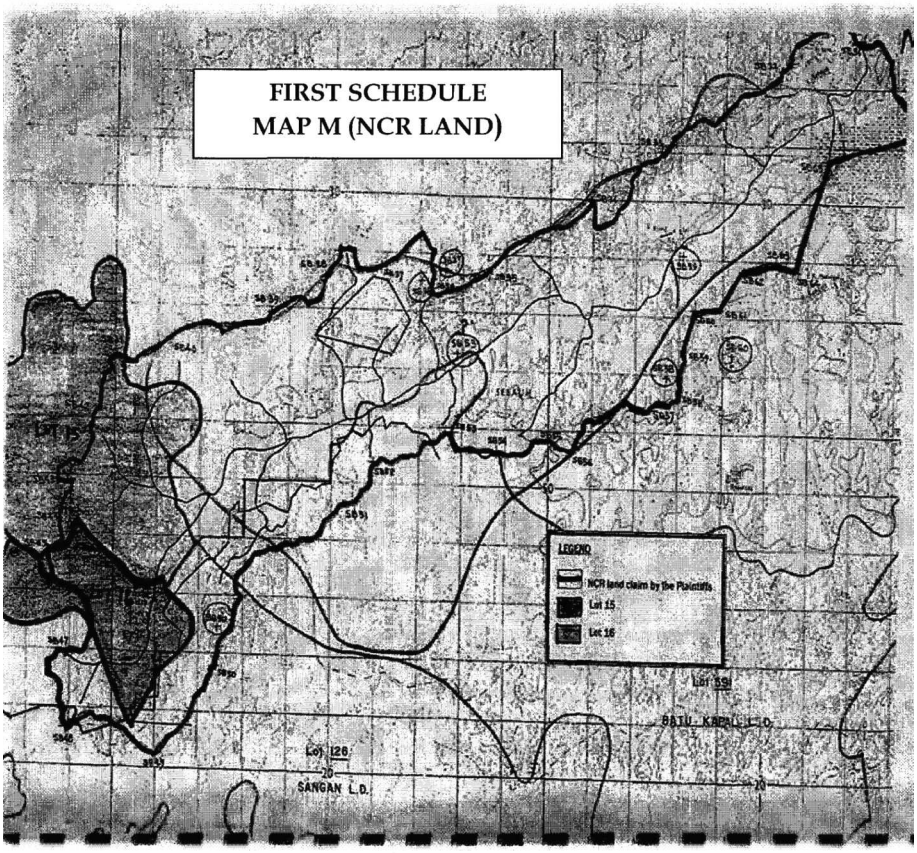
E

F

G

H

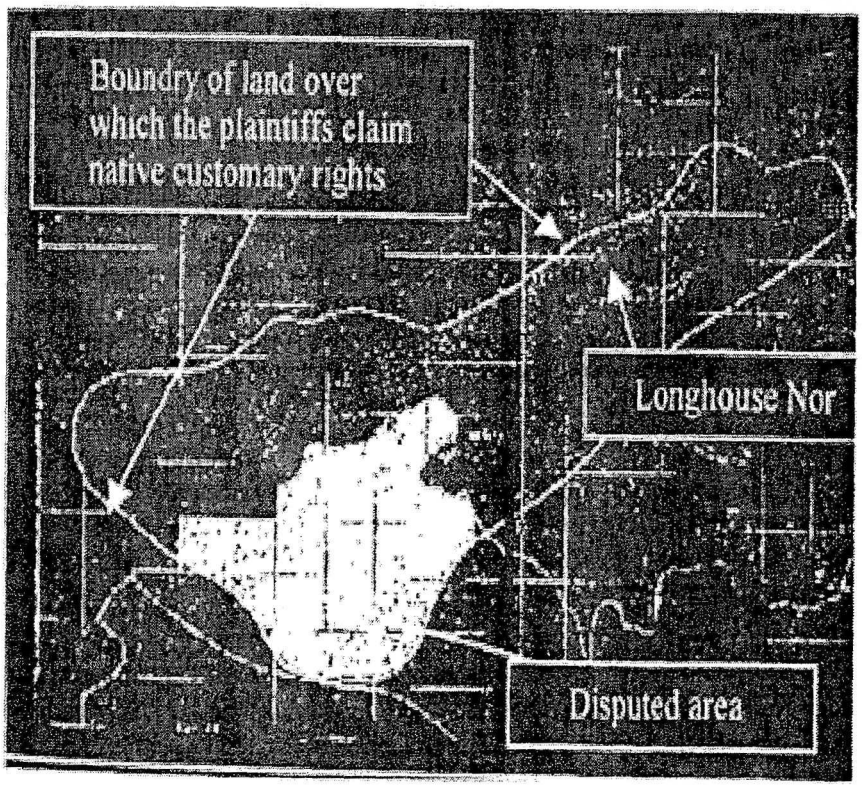
I


FIRST SCHEDULE
MAP M (NCR LAND)
LEGEND
NCR land claim by the Plaintiffs
Lot 15
Lot 16
Lot 126
25
SANGAN L.D.

A

SECOND SCHEDULE
JUDGMENT MAP (ORIGINAL NCR LAND)

B



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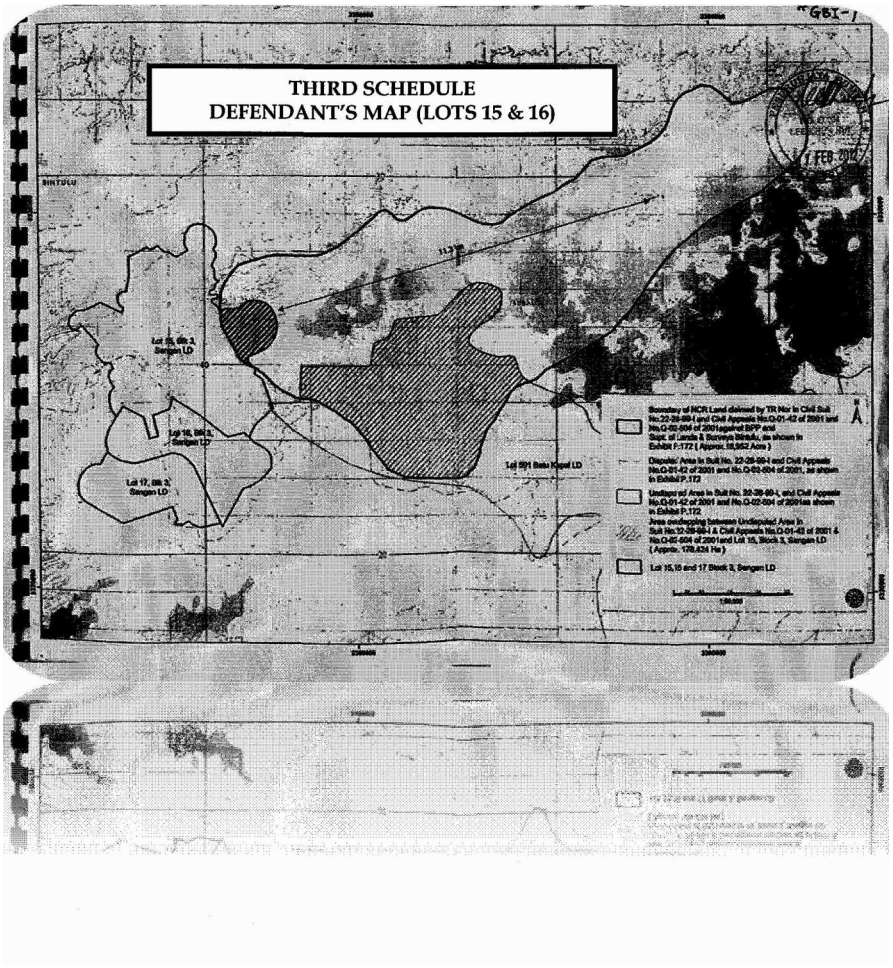
THIRD SCHEDULE
DEFENDANT'S MAP (LOTS 15 & 16)
SINTULU
Lot 15, Blk 3, Sengan LD
Lot 16, Blk 3, Sengan LD
Lot 17, Blk 3, Sengan LD
Lot 591 Batu Kipad LD

Action against first defendant struck out with costs.

Reported by Ashok Kumar